

**UNITED STATES OF AMERICA**  
**MERIT SYSTEMS PROTECTION BOARD**

**WILLIAM CRAWFORD**

**v.**

**DEPARTMENT OF THE ARMY**  
**NEW CUMBERLAND ARMY DEPOT**

} **Docket No.**  
**PH075209053-80-21**

**ORDER**

**This case is REOPENED, REVERSED, and REMANDED to the Philadelphia Field Office.**

Appellant alleges his removal was in reprisal for certain "whistleblowing" activities which allegedly occurred when he filed a compensation claim against his agency in Federal District Court. The presiding official determined that the filing of a lawsuit did not constitute "whistleblowing" under 5 U.S.C. § 2302(b)(8) because, he ruled, this subsection applies only to complaints made to the Special Counsel, an inspector general, or an employee of an agency designated to receive such complaints. This interpretation of the statute is incorrect, because the presiding official erroneously assumed that the only disclosures protected were those mentioned under § 2302(b)(8)(B), completely ignoring the provisions of § 2302(b)(8)(A), which protect a wider range of disclosures.

The question of whether filing a lawsuit constitutes protected "whistleblowing" is one we need not decide in this case, because clearly an employee who is subjected to a personnel action taken against him in reprisal for filing a lawsuit involving his agency is protected by 5 U.S.C. § 2302(b)(9), which makes it a prohibited personnel practice to:

take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal rights granted by any law, rule, or regulation.

See *In Re Frazier* 1 MSPB 159, 183, 185 (1979). Because a removal is a personnel action which is appealable to the Board, appellant may raise a prohibited personnel practice as an affirmative defense to such action, 5 U.S.C. 7701(c)(2)(B).

Accordingly, this case is REMANDED to the presiding official for a complete determination of whether the agency action was

taken with knowledge of, and in reprisal for, appellant's exercise of an appeal right.\*

For the Board:

ERSA H. POSTON.

January 30, 1980.

**UNITED STATES OF AMERICA**  
**BEFORE THE MERIT SYSTEMS PROTECTION BOARD**  
Philadelphia Field Office

**WILLIAM CRAWFORD**

v.

**DEPARTMENT OF THE ARMY**  
**NEW CUMBERLAND ARMY DEPOT**

**Decision Number: PH075209053**

**Date: December 11, 1979**

**INTRODUCTION**

Mr. Crawford appealed on August 10, 1979, from an action taken by the Department of the Army, New Cumberland Army Depot, New Cumberland, Pennsylvania, to remove him from the position of Laborer, WG-2; effective July 27, 1979. The action was based upon: "Misconduct-Making False Statements on Government Documents."

**JURISDICTION**

Because this action was commenced by the agency subsequent to January 10, 1979, it is governed by the provisions of the Civil Service Reform Act of 1978 (hereafter Reform Act), Pub. L. No. 95-454, 92 Stat. 1111 (1978). See 5 U.S.C.A. § 1101 note (Supp. 1979). The Reform Act grants the Board subject matter appellate jurisdiction over the action. See 5 U.S.C. §§ 7511(a)(1)(A), 7513(d), and 7701.

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\*On January 14, 1980, the Board received a petition for review alleging, among other things, that the agency action was based on a prohibited personnel practice. The petition, however, does not meet the requirements of our regulations because it fails to state the basis for these generalized allegations. On remand, appellant will have another opportunity to present evidence of prohibited personnel practices which may have been a basis for the agency decision.

The appellant was an individual in the competitive service who was not serving a probationary or trial period under an initial appointment. Therefore, the Reform Act grants the Board appellate jurisdiction over this action. See 5 U.S.C. § 7511(a)(1)(A), 7513(d), and 7701.

The appeal was filed with this office in a timely manner as prescribed by MSPB Regulations. See 5 CFR 1201.22(b). Therefore, jurisdiction was accepted.

#### ANALYSIS AND FINDINGS

The agency effected this action based on the charge that appellant intentionally falsified his applications for employment in that he answered "NO" to question 30 on two Standard Form 171s, which state: "Within the last five years have you been fired from any job for any reason?"

Since this agency action was taken in accordance with the provisions of 5 U.S.C. § 7512 and Part 752, Subpart C of the Office of Personnel Management Regulations; § 752.301, the burden of proof imposed upon the agency must comply with that established by 5 U.S.C. § 7701(c)(1)(B). That is, the agency must support its case by a preponderance of the evidence before the MSPB can affirm the agency decision on appeal.

Likewise, in accordance with 5 U.S.C. § 7701(c)(2), MSPB may not affirm an agency decision that shows harmful error in the application of the agency's procedures in arriving at a decision; when the decision was based on any prohibited personnel practice, as described in 5 U.S.C. § 2302(b); or when the agency decision is not in accordance with the law. The above reasons for reversal of an agency decision are considered to be affirmative defenses afforded to the appellant; and, in accordance with MSPB Regulations, § 1201.56, the burden of proof as to these defenses rests with appellant. That burden must be carried by a preponderance of the evidence. See 5 CFR 1210.56(b).

In support of their removal action, the agency produced copies of the two Standard Form 171s, which were signed and certified by appellant to be true and correct, at the time he completed them. These documents show that appellant had marked "NO" in the box corresponding to question thirty, as described above. The agency also produced testimonial and documentary evidence showing that appellant had been removed from an Administrative Supply Technician position at Fort Indiantown Gap, Pennsylvania, in 1973 [see removal SF-50, effective May 16, 1973, in appellate file; H.T., pp. 9-14, 170].

In response to this evidence, the appellant, essentially, admits that he completed the two SF-171s by answering "NO" to question

30; and, notwithstanding his answer to question 30 on both applications, that he had, in fact, been removed from a former position at Fort Indiantown Gap [H.T., pp. 89-98, 101-105, 112, 116]. Nonetheless, the appellant asserts that he had a reasonable belief that he was not falsifying these documents because of his conviction that his former agency's action was not just; was not based on true facts; and would soon be nullified by his attempts to revive an appeal on the matter, with the MSPB. Thus, in this frame of mind, he believes that his answer to the questions on the two SF-171 applications was not a falsification; because they were made in reasonable anticipation of a future official action that would be taken to correct his records [H.T., p. 123].

In order for the appellant to prevail on this theory, he would have to show that his beliefs at the time he completed the SF-171s present a good defense in law, and would be cause to reverse the agency action as not in accordance with the law, per the provisions of 5 U.S.C. § 7701(c)(2)(C). As stated in the certification portion of the Standard Form 171, falsification of a government document is a violation of 18 U.S.C. § 1101 which prohibits falsification of documents in any matter within the jurisdiction of any government agency. It is settled law that falsification of an application for federal employment, i.e., a Standard Form 171, comes within the purview of this statute; *United States v. Estus*, 544 F.2d 934, 935 (1976). As such, it is a good defense when lack of knowledge or intent is shown in the erroneous completion of such a document, *United States v. Lange*, 528 F.2d 1280, 1287 (1976); *United States v. Adler*, 380 F.2d 917, 920 (1967); *United States v. McCue*, 301 F.2d 452 (1962); *United States v. Marchisio*, 344 F.2d 653 (1965). In this regard, however, the reasonableness of appellant's belief that his answer on the SF-171 was not a falsification must be weighed and evaluated in the light of the context of the events, *Weinberg v. Mach*, 360 F.2d 816, 819 (1965); and the question of intent to falsify is determined by whether the subject made the misrepresentation deliberately, knowingly, and willfully; *United States v. Lange*, 528 F.2d 1280, 1288 (1976).

In this case, the appellant indicates that he was aware of his prior removal and that he intentionally answered "NO" to question 30, despite that awareness. Further, no matter how convinced the appellant was that his prior removal would be reversed, the fact remains that it had not been, despite an administrative appeal at the time of the action [H.T., pp. 14, 15, 23, 147]. In addition, appellant, himself, admits that he has no official documentation from either the former U.S. Civil Service Commission, or the Merit Systems Protection Board, supporting his belief that the prior action would be reversed [H.T., p. 152].

Therefore, construing appellant's actions in the context of the events evidence in this case, I find that appellant intentionally and willfully falsified his application for employment. Consequently, his assertions as to his beliefs do not form a valid defense to the agency action in this case. Thus, my review of the evidence shows that the agency has sustained its reason for removing the appellant by a preponderance of the evidence.

The appellant, next, asserts the affirmative defense that the agency took this removal action against him in reprisal for his complaints of an alleged prohibited personnel practice, as defined in 5 U.S.C. § 2302(b)(8). That section defines a prohibited personnel practice, essentially, as the taking of a personnel action, or failure to take a personnel action, by an agency official, acting under color of his/her authority, with the intent to have his action be in reprisal for a disclosure of information of the violation of law, rule or regulation. See 5 U.S.C. § 2302(b)(8)(i). Before an employee can invoke the protection of this defense, however, it is necessary that the appellant/employee show that he/she has actually complained to an Inspector General of an agency, to the Special Counsel, or to some other employee of the agency who is designated by the head of the agency to receive such complaints. See Conference Report to Accompany S.2640, Civil Service Reform Act of 1978, 95th Congress, 2d Session; Report No. 95-1717, *Joint Explanatory Statement of the Committee on Conference*, 130 (October 5, 1978), reprinted in *Legislative History of the Civil Service Reform Act of 1978* at 1972 (March 27, 1979).

In this regard, the appellant asserts that he was concerned about undue delay in the processing of his employee compensation claim, which was based on an injury he suffered shortly after coming to work at the agency. Having received no satisfaction from his various protests to the personnel office, he filed suit in Federal District Court to speed up the process (H.T., pp. 7, 40, 126, 127). From this information, I find that the appellant has not made the type of complaint contemplated in 5 U.S.C. § 2302(b)(8), or in 5 U.S.C. § 7701(c)(2)(C), to the appropriate authority within the agency or to the Office of Special Counsel. Further, the subject of appellant's complaint runs to a matter personal to himself; and, does not pertain to a violation of statutory law, and court interpretations of those statutes, or a "whistle blower" type of complaint concerning gross mismanagement, or government waste or inefficiency in its mission accomplishment; as contemplated in the House Amendments to the initial introduction of Civil Service Reform legislation, which culminated in HR 11280 and which was adopted in the Joint Explanatory Statement of the Committee on Conference. See Report of the Committee on Post Office and Civil

Service on HR 11280 To Reform the Civil Service Laws, 95th Congress, 2d Session; Report No. 95-1403, 386 (July 31, 1978), *reprinted in* Legislative History of the Civil Service Reform Act of 1978 at 760 (March 27, 1979); and, Conference Report to Accompany S.2640, Civil Service Reform Act of 1978, 95th Congress, 2d Session; Report No. 95-1717, *Joint Explanatory Statement of the Committee on Conference*, 130 (October 5, 1978), *reprinted in* Legislative History of the Civil Service Reform Act of 1978 at 1972 (March 27, 1979).

Finally, the appellant questions the appropriateness of removal as the penalty in this case because this was his first employment offense at the agency, and his work record did not show any other disciplinary action. In this regard, it is clear that removal of employees for falsification of an official government document is a matter that ordinarily lies within the discretion of the governmental agency taking the action, as long as the action was taken in good faith and with proper adherence to applicable statutes and regulations; and, as long as the action was not so harsh a penalty as to bear no relation to the efficiency of the service, *Giles v. United States*, 213 Ct. Cl. 602 (1977). In this case, the agency has shown that removal for a first offense of falsification is within their suggested table of penalties (see hearing exhibit #5, offense #10), and that, had they known of appellant's prior removal action, he would not have been hired in the first place (H.T., pp. 34, 43, 44, 75, 171). Further, agency removal actions taken against employees who have had exemplary employment records have been held as taken for efficiency of the service when the cause for removal was falsification of official documents, *Williams v. United States*, 434 F.2d 1346, 1353 (1970); *Rodriguez v. Seamans*, 463 F.2d 837, 842, 843 (1972).

In view of the above case law and discussion, absent evidence to show that the agency action was out of proportion to the nature of the employment offense at issue, or not in accordance with the agency's own internal guidelines; I find no basis to conclude that the choice of removal in this instance was not taken for such cause as promotes the efficiency of the service, within the meaning of those words, as found in 5 U.S.C. § 7513(a). This is so because of the need for all agencies to depend on the integrity, credibility, and veracity of its employees, when dealing in matters of official documentation, *U.S. v. Meyers*, 131 F. Supp. 525 (1955). In this instance, appellant's conduct casts doubt on his ability to so act. Therefore, his removal was not an action that would not serve to promote the efficiency of the service.

#### DECISION

The agency action is affirmed.

## NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on January 15, 1980 unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any part to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be received by the Secretary of the Merit Systems Protection Board, Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

- (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
- (2) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. § 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any *final* decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

ROGER A. SCHWARTZ,  
*Presiding Official.*